NO. 88-1713

FILED
JUL 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

CHARLES WILLIAM O'BRIEN,

Petitioner

v.

JACOB K. STEIN AND
PAXTON & SEASONGOOD, L.P.A.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

Gerald W. Simmons
Earle Jay Maiman
THOMPSON, HINE AND FLORY
Paxton & Seasongood Office
1700 Central Trust Tower
Cincinnati, Ohio 45202
(513) 352-6700

Counsel for Respondent

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of the Case.	1
Summary of the Argument.	5
Argument (Reasons Why the Petition Should Be Denied)	7
1. O'Brien did not raise the question which he presents to the Supreme Court of the United States in the Common Pleas Court or in the Court of Appeals. He did not properly raise the question in the Supreme Court of Ohio.	7
2. O'Brien's argument is hypothetical in nature and has no relation to the facts of this case since O'Brien was not a pro se litigant at the time the allegedly slanderous remarks were made.	11
3. O'Brien was not denied Equal Protection of the Law under the Fourteenth Amendment to the U.S. Constitution, because no Ohio state Court has ever held that a pro se litigant is not entitled to the same immunity	

Page

as an attorney for comments made during and relating to judicial proceedings. 13

4. Even if pro se litigants were not entitled to absolute immunity for slanderous comments made during and related to judicial proceedings while attorneys were entitled to immunity, a difference in treatment would not constitute a violation of the Equal Protection clause because there are valid reasons for a difference in treatment 15

Conclusion 17

Appendix 20

TABLE OF AUTHORITIES

United States Supreme Court Cases:

Cardinale v. Louisiana, 394 U.S. 437 (1969) 9,11

Flast v. Cohen, 392 U.S. 83 (1968). 12

Page

Hill v. California,
401 U.S. 797 (1971) 9

Princeton University v.
Schmid, 455 U.S. 100 (1982) . 12

Safeway Stores, Inc. v.
Oklahoma Retail Grocers
Ass'n., Inc.,
360 U.S. 334 (1959) 11

Sierra Club v. Morton,
405 U.S. 727 (1972) 12

Street v. New York,
394 U.S. 576 (1969) 10

Ohio State Cases:

Erie County Farmers' Insurance Co.
v. Crecelius,
122 Ohio St. 210,
171 N.E. 97 (1930). 13,15

Justice v. Mowery,
69 Ohio App.
2d 75, 430 N.E.2d 960
(1980). 13

Rudin v. Fauver,
30 Ohio C.C. 315 (1909) . . . 14

Schade v. Carnegie Body Co.,
70 Ohio St. 2d 207,
436 N.E.2d 1001 (1982). . . . 10

Simmons v. Climaco,
30 Ohio App. 3d 225,
507 N.E.2d 465 (1986) 13

Surace v. Wuliger
25 Ohio St. 3d 229,
495 N.E.2d 939 (1986) 13,15,16

Constitution:

U.S. Constitution,
Fourteenth Amendment 4,6-13,15

STATEMENT OF THE CASE

O'BRIEN I

This petition arises out of the second of two related cases originally filed in the Court of Common Pleas, Franklin County, Ohio. In the first case (O'Brien I), Petitioner Charles William O'Brien (O'Brien) was a defendant. Respondent Jacob K. Stein (Stein) represented the plaintiffs. At that time, Stein was a shareholder in Respondent Paxton & Seasongood, L.P.A. (Paxton & Seasongood). Stein's clients were the majority shareholders of a corporation of which O'Brien was an officer and minority shareholder. In O'Brien I, Stein's clients were successful in having O'Brien removed as an officer of the corporation. At all relevant times in O'Brien I, O'Brien was represented by counsel and was not a pro se litigant.

As part of the proceedings in O'Brien I, a hearing was scheduled on a

Motion for Temporary Restraining Order. The trial judge asked that counsel for all parties meet with him in chambers to discuss the possibility of settling the case. A conference was held which was attended by the trial judge, two attorneys representing O'Brien, Stein, and another attorney from Stein's office.

During the course of this conference, the trial judge asked counsel to explain why the parties could not resolve their differences. In response to this question, Stein explained that all of the parties were members of the same family and that bitter antagonisms and emotions existed between them. Stein allegedly stated that his clients had reported to him that O'Brien was so adamant about staying in control of the business that he had threatened to burn it down rather than to allow control to be transferred.

O'BRIEN II

On July 2, 1987, O'Brien filed O'Brien II which was a complaint for slander against Stein and Paxton & Seasongood. In this suit, he claimed that Stein's comments at the conference in O'Brien I about O'Brien's threat to burn down the business were untrue and malicious.

On July 8, 1987, in O'Brien II, Stein filed an Answer and a Motion for Summary Judgment. In the Motion for Summary Judgment in O'Brien II Stein asserted his absolute immunity from a suit for slander resulting from statements made in a judicial proceeding. O'Brien thereafter commenced discovery, but upon Stein's objection thereto, the court held that the issue raised by Stein's Motion for Summary Judgment was a legal one upon which there was no factual dispute and so, therefore, there was no need for discovery.

On September 16, 1987, the trial court granted Stein's Motion for Summary Judgment

on the basis that Stein's statements in court were privileged. O'Brien did not assert in the trial court that granting judgment to Stein would in any way infringe upon O'Brien's equal protection rights under the Fourteenth Amendment to the U.S. Constitution.

On November 17, 1987, O'Brien filed a Notice of Appeal. The case was extensively briefed in the Court of Appeals. At no time did O'Brien raise the issue of equal protection. He simply argued that Stein's remarks should not be privileged. The Court of Appeals affirmed the trial court.

On June 27, 1988, O'Brien filed a Notice of Appeal to the Supreme Court of Ohio in which, for the first time, an equal protection argument was advanced. On September 6, 1988, O'Brien filed a Memorandum in Support of Jurisdiction in the Supreme Court of Ohio. On October 12, 1988, the Supreme Court of Ohio sua sponte dismissed O'Brien's attempted appeal

because of a failure to raise a constitutional question, and on December 14, 1988, the Supreme Court of Ohio reaffirmed this decision.

SUMMARY OF THE ARGUMENT

In the petition filed with this Court, O'Brien raises an issue not properly presented by him to any Ohio state Court, and not decided by any of the Ohio state Courts below. This Court should not consider this issue for the first time on this appeal.

O'Brien was not a pro se litigant at the time the allegedly slanderous remarks were made. Rather, he was represented by two attorneys. These attorneys enjoyed the same immunity as Stein. The facts of this case do not give rise to the issue presented to this Court by O'Brien.

Even if O'Brien had been a pro se litigant at the time of the allegedly slanderous remark, he was not denied equal

protection of the law because no Ohio state Court has ever held that a pro se litigant is not entitled to the same immunity as a practicing attorney. On the contrary, Ohio courts have recognized that this immunity extends to others, and not only to practicing attorneys.

Even if pro se litigants were not entitled to absolute immunity for slanderous comments made during judicial proceedings, and attorneys were entitled to such immunity, there are valid reasons for a difference in treatment. Pro se litigants, unlike attorneys, are not subject to the Code of Professional Responsibility which requires attorneys to maintain the integrity of the legal profession (Canon 1), to exercise independent professional judgment (Canon 5), and to represent a client within the bounds of the law (Canon 7). Attorneys, unlike pro se litigants, are subject to discipline for failing to observe these

obligations. Moreover, attorneys do not possess the emotional or personal interest of a pro se litigant.

REASONS WHY THE PETITION SHOULD BE DENIED

1. O'Brien did not raise the question which he presents to the Supreme Court of the United States in the Common Pleas Court or in the Court of Appeals. He did not properly raise the question in the Supreme Court of Ohio.

The sole question presented by O'Brien's petition is whether the equal protection clause of the Fourteenth Amendment to the U.S. Constitution would require that the immunity granted attorneys under Ohio law, relating to comments which they make in court, be extended to pro se litigants.

The Ohio Rules of Civil Procedure and the Ohio Appellate Rules are substantially similar to the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. Under these rules, a party is required to set forth his position

at a relatively early stage in the proceeding in order to preserve it. For example, Ohio Civil Rule 8 (like the comparable Federal Rule) provides for a short and plain statement of the claim. Ohio Civil Rule 56 (like the comparable Federal Rule) provides that a party against whom a Motion for Summary Judgment is filed must come forward with facts or legal argument in support of his position. He may not rest upon the pleadings. O'Brien did not raise the equal protection argument which he is advancing in this Court in either his Common Pleas Court complaint (or the amendments thereto) or in the summary judgment proceedings.

The Ohio Rules of Appellate Procedure are quite similar to the Federal Rules of Appellate Procedure. Ohio Appellate Rule 12(A) provides in substance that an appeal shall be determined on the assignments of error set forth in the briefs (Ohio Appellate Rule 16), the record on appeal

(Ohio Appellate Rule 9), and on the oral arguments of the parties or their counsel (Ohio Appellate Rule 21). These rules required O'Brien to assert his equal protection argument if he wanted to have it considered by the Ohio Appellate Court. O'Brien did not in his briefs, in the record on appeal, or in his oral argument in the Court of Appeals make any argument related to equal protection. The Court of Appeals affirmed the trial court.

The Supreme Court of the United States has repeatedly held that it will not consider a claim unless it has been properly raised and considered below. Hill v. California, 401 U.S. 797, 805 (1971). As pointed out in Cardinale v. Louisiana, 394 U.S. 437 (1969), there are sound reasons for this rule, including the importance of allowing lower courts the opportunity to interpret state law in such a way as to avoid constitutional questions. Id. at 439.

The first and only time in the state court that O'Brien referenced the equal protection clause of the Fourteenth Amendment to the U.S. Constitution was in his Notice of Appeal to the Supreme Court of Ohio. His attempt to deal with the issue at that late stage of the proceedings was ineffectual because "[T]he fundamental rule is that an appellate court will not consider any error which could have been brought to the trial court's attention, and hence avoided or otherwise corrected." Schade v. Carnegie Body Co., 70 Ohio St. 2d 207, 210, 436 N.E.2d 1001, 1003 (1982).

This Court has held that when "[T]he highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576, 582 (1969). Since the Ohio Supreme Court did not pass

upon the equal protection question, review by this Court is not warranted.

This Court has consistently stated that it will not decide a federal question raised for the first time on a review of the state court decisions. Cardinale v. Louisiana, 394 U.S. 437 (1969); Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc., 360 U.S. 334 (1959).

In light of O'Brien's failure properly to raise the issue he presents to this Court in the state court proceedings, the petition should be dismissed.

2. O'Brien's argument is hypothetical in nature and has no relation to the facts of this case since O'Brien was not a pro se litigant at the time the allegedly slanderous remarks were made.

O'Brien's argument focuses on the alleged disparity of treatment between a pro se litigant and counsel for the opposing party during a status conference in the trial court. What O'Brien has

failed to point out to this Court is that during the conference he was represented by counsel. The only persons present at the conference were Stein, an attorney associated with Stein, O'Brien's counsel, and the trial judge. Thus, O'Brien's argument concerning the denial of equal protection to a pro se litigant is hypothetical in nature and has nothing to do with the facts of this case. The Supreme Court has repeatedly held that it will not deal with issues not presented by the facts of the case before it. Princeton University v. Schmid, 455 U.S. 100, 102 (1982); Sierra Club v. Morton, 405 U.S. 727, 732-733 (1972); Flast v. Cohen, 392 U.S. 83, 100 (1968).

BEST AVAILABLE COPY

3. O'Brien was not denied Equal Protection of the Law under the Fourteenth Amendment to the U.S. Constitution, because no Ohio State Court has ever held that a pro se litigant is not entitled to the same immunity as an attorney for comments made during and relating to judicial proceedings.

Under Ohio law, an attorney has absolute immunity from a libel and slander action for statements made while representing a client in the course of litigation, either in pleadings, briefs, or in oral statements to the judge and jury, provided the defamatory matter bears some possible relation to the judicial proceeding. Simmons v. Climaco, 30 Ohio App. 3d 225, 227, 507 N.E.2d 465, 467 (1986). This immunity has never been held inapplicable to pro se litigants. See Surace v. Wuliger, 25 Ohio St. 3d 229, 495 N.E.2d 939 (1986); Justice v. Mowery, 69 Ohio App. 2d 75, 430 N.E.2d 960 (1980); Erie County Farmers' Insurance Co. v. Crecelius, 122 Ohio St. 210, 171 N.E. 97 (1930). On the contrary, as early as 1909,

Ohio courts recognized that this immunity extended to pro se litigants. Rudin v. Fauver, 30 Ohio C.C. 315 (1909). The issue before the Rudin court was "[W]hether all statements made by attorneys and others in court, in relation to matters in litigation therein, are the subject of an absolute or only a qualified privilege." Id. (emphasis added). The court held that an absolute immunity attached. Id. at 316.

The Ohio state courts did not hold that O'Brien lacked immunity from suit for slanderous statements relating to the litigation. The Ohio state courts held that Stein was also entitled to such immunity. Thus, there is no finding in the opinions of the Ohio state Courts that O'Brien is being subjected to different standards than Stein.

BEST AVAILABLE COPY

4. Even if pro se litigants were not entitled to absolute immunity for slanderous comments made during and related to judicial proceedings while attorneys were entitled to immunity, a difference in treatment would not constitute a violation of the Equal Protection clause because there are valid reasons for a difference in treatment.

The rule of absolute immunity originated from the belief that if attorneys were not at liberty to speak freely in court, then they would not zealously defend their clients for fear of future suits for libel and slander. Erie County Farmer's Insurance Co. v. Crecelius, 122 Ohio St. 210, 214-215, 171 N.E. 97, 98 (1930). This belief conforms to the basic goal of our judicial system -- to promote the free and open discussion of all aspects of a case in order to assist the court in determining the truth. Surace v. Wuliger, 25 Ohio St. 3d 229, 235, 495 N.E.2d 939, 944 (1986).

Attorneys, unlike pro se litigants, are subject to the Code of Professional

Responsibility, which requires them zealously to represent their clients. Id. at 235, 495 N.E.2d at 944. Failure to do so can result in severe sanctions being assessed against the defaulting attorney. Moreover, attorneys, again unlike pro se litigants, are under an obligation to maintain the integrity of the legal profession, to exercise independent professional judgment, and to represent their clients within the bounds of the law. These obligations (and the disciplinary procedures for enforcing them) alone are ample justification for treating attorneys differently than non-lawyers with respect to the scope of immunity for statements made in court.

It is also worth noting that while attorneys do have an interest at stake in the outcome of the judicial proceedings, they do not possess the emotional or personal interest in the outcome that a pro se litigant has. Therefore, their

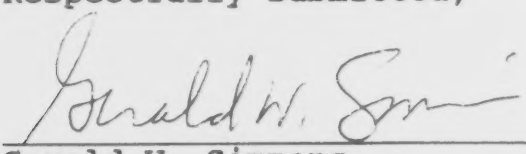
statements are less likely to be tainted with ill will than a pro se litigant's statements.

CONCLUSION

The petition for a writ of certiorari should be denied because: (1) O'Brien has not properly raised in the Ohio state Courts the issue he seeks to present here; (2) the issue presented is totally hypothetical since O'Brien was not a pro se litigant at the time of the alleged slander; (3) Ohio law simply does not condone the disparate treatment of pro se litigants which O'Brien hypothesizes; and (4) disparate treatment if it existed could well be justified based upon the obligations imposed upon counsel (and not

upon pro se litigants) by the Ohio Code of Professional Responsibility.

Respectfully submitted,

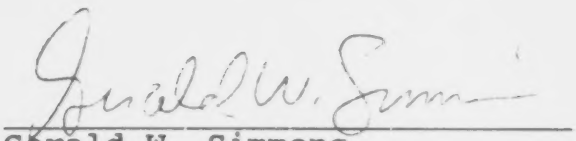


Gerald W. Simmons
THOMPSON, HINE AND FLORY
Paxton & Seasongood Office
1700 Central Trust Tower
Cincinnati, Ohio 45202
(513) 352-6700

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that three copies of the Respondents' Brief in Opposition to the Petition for Certiorari has been served upon Charles William O'Brien, c/o National Heritage, P.O. Box 8369, Columbus, Ohio 43201, by regular first-class U.S. mail, postage prepaid on this 12th day of July, 1989.



Gerald W. Simmons